Hastings Law Journal

Volume 11 | Issue 3 Article 1

1-1960

# Law and Government in the U.S.S.R.

Julian Towster

# LAW AND GOVERNMENT IN THE U.S.S.R.

*By* JULIAN TOWSTER*

It is impossible to assess any aspect of the Soviet polity without keeping in mind two things: (1) that only on the rarest occasions in the four decades of Soviet existence has the reality of Soviet life corresponded to official theory, and (2) that no event in the Soviet Union can be properly evaluated without some knowledge of its background and context.

Soviet pronouncements of recent years have repeatedly emphasized the claims that the post-Stalin regime has brought about a return to: (1) "socialist legality," *i.e.*, a guarantee of the citizens' rights and liberties, (2) popular sovereignty, *i.e.*, genuine participation by the people in the governance of the state, and (3) an entrenchment and enhancement of the status and powers of the national entities of the Soviet federation. In order to evaluate the validity of these claims we must examine—however cursorily—the background and evolution of the Soviet approach to law, federalism, and judicial functions, then consider the so-called "liberalizations" of the Khrushchev period, and finally venture a glimpse into the future of law, rights and justice in the U.S.S.R.

## *The Attitude Toward Law*

First, let us look at the Soviet approach to law, more precisely at the current emphasis on the value of law and the imperative of "socialist legality" in the U.S.S.R. In point of fact, the emphasis on the utility and stability of law is not new on the Soviet scene—it actually dates back to the mid-thirties. What is new is the revival of this emphasis and especially its coupling with statements for a renewal of "socialist legality" after Stalin's death. Before 1937, that is for nearly 20 years of the Soviet regime, there was a widespread negative attitude toward law in the U.S.S.R. Traditionally the attitude of the Russian peasant toward law, lawyers and judges was one of fear and hatred, as the Russian folk-sayings and proverbs amply testify.[1] While the peasants venerated the Tsar, the "Little Father" who will some day deliver them from the clutches of the landlords and bureaucrats, they

---

* J.D., Ph.D., Professor of Political Science, Univ. of California at Berkeley, author of POLITICAL POWER IN THE U.S.S.R. (1948) and co-author of EUROPEAN POLITICAL SYSTEMS (Taylor Cole ed. 1953, 1959). Former Chief of the Foreign Political Section, East European Branch, Office of Research and Intelligence, Department of State.

[1] Proverbs such as the following had wide currency among the peasant masses: "Show me a scribe (a judge) and I will show you a crook;" "His words are straight, but his fingers are crooked."

despised the latter.[2] Generally a strong anarchistic strain ran in the Russian character. Needless to say, for some time after the seizure of power the Bolsheviks did nothing to make law and legality dearer to the masses. On the contrary, Marxist theory generally spoke of both state and law as tools of the exploiting, dominant classes, and it promised that the proletariat, after it seized power and established its dictatorship, would lead society to the abolition of all classes and with them to the "withering away" of the institutions of state and law. Lenin himself spoke of the Soviet state as a "semi-state" which was on the road to "withering away." The most prominent Soviet legal thinkers took these "withering away" ideas quite seriously and declared that the working class has no use for law, that it should take a critical attitude not only toward the capitalist state, ethics and law, but to the Soviet state, ethics and law. For example, Professor Stuchka, erstwhile dean of Soviet jurists, declared in 1927 that communism means "not the victory of socialist law, but the victory of socialism over any law," since law will disappear when classes are abolished. Instead of such words as "crime" and "punishment," Soviet criminal lawyers substituted such fanciful mouthfuls as "socially dangerous act" and "measure of defense." The judges, most of whom were trained under the old regime, frantically sought the sources and meaning of law in such formulas as "revolutionary legality," "revolutionary expediency," "socialist legality," "the socialist concept of law," with the sad consequence that "law" and "legality" were utterly nebulous and unstable terms in the semantics of Soviet society—concepts little understood and little respected by the citizenry. More than that, while the inauguration of the Five Year Plans made discipline and obedience to the commands of the state a prime prerequisite for their success, and Stalin warned in 1930 and 1933 that far from the "withering away" of the state, "the highest development of governmental power" (which would obviously mean of law also) was called for in the emerging future, most of the jurists continued on their old and merry way. Their leading spokesman at that time, Professor Pashukanis, told them that the "withering away" of the state would become decisive in 1937, so some of these lawyers called for the abolition of village councils, others for an end to the courts. The drafting of the codes was delayed; the study of law was neglected.

If such views were not conducive to any respect for law, they required clarification in any case by the late thirties, when it was officially stated that the Soviet Union had entered the phase of "completing" the establishment of a classless society. Such a clarification came in 1937-38 in the form of thundering condemnations by Andrey Vyshinsky of all negative expressions

[2] Their sufferings and privations under the Tsarist autocracy they blamed on the officials and landlords. As for the lack of intervention by the Tsar in behalf of the people, the peasant proverb explained: "The sun cannot shine everywhere, and the Tsar cannot be everywhere."

concerning the form, content or viability of Soviet law. Vyshinsky denounced Pashukanis and others as "legal nihilists" who were undermining the might of the Soviet state, despite Stalin's call for the "stability of laws" as a basis for "the durability of the state order . . .(and) state discipline." Pashukanis and other prominent jurists disappeared in the purge that followed. Once and for all condemning all predictions of the early extinction of law, Vyshinsky called for the mastery of the study of law. Numerous new law schools were opened and a terrific propaganda was unleashed enjoining the citizens to respect and obey law as a necessary instrument of social control and vital necessity for the progress of the U.S.S.R. In short, obedience to law became a virtue in Soviet society and the demand for "stability of laws," a solemn promise of protection of the interests of the citizenry.

The question is: did this new and positive approach to law actually guarantee the rights and liberties of the citizens? Did it mean acceptance of the Rule of Law—recognition by the leaders of the supremacy of law over rulers and ruled alike? Does the present official emphasis on law and "socialist legality" mean such recognition by Khrushchev and his colleagues?

### *The Question of Popular Sovereignty*

The same question may be raised with regard to the new stress on popular sovereignty in Soviet political semantics. Early in the regime Soviet jurists—considering themselves good Marxists—poked fun at the concept of popular sovereignty as a fiction of bourgeois jurisprudence designed to hoodwink the masses and conceal the rift of society into antagonistic classes and the dominance of the class of the bourgeoisie. In the Soviet Union, wrote Professor Cheliapov in the Encyclopedia of State and Law, the dictatorship of the proletariat took the place of popular sovereignty "doing away with the illusory sovereignty of the entire nation, the entire people." Professor Gurvich wrote that the Soviets "have in mind not the people, a nebulous, indefinite, multicolored mass, but the dominant class: the proletariat and toiling peasantry only." However, as the Soviet leaders became increasingly aware of the value of suitable political semantics, and in view of the fact that Stalin proclaimed in 1936 that there were no longer any antagonistic classes in the Soviet Union, which had achieved socialism and was marching toward Communism, the Soviet jurists changed their tune. In such circumstances, Vyshinsky proclaimed there is no longer room for the view that Soviet law was the will of the proletariat as the dominant class: "the place of the class," said he, "is taken by the people, the toilers." In the Soviet Union the people as a whole are now the sovereign of the land. Hence, the new definition of law which he proposed reads as follows:

> Socialist law of the epoch of conclusion of socialist construction and the gradual transition from socialism to communism is a system of rules of

> conduct (norms) established in legislative order by the rule of the toilers and expressing their will, the will of the entire Soviet people, which is led by the working class headed by the Communist Party (Bolsheviks), for the purpose of defending, strengthening, and developing socialist relations and for the gradual construction of the communist society.

This definition prevails to this day. The question is: how much truth is there in it? What proof do we have of popular sovereignty in the USSR? What role—if any—do the people play either directly or through their elected representatives in the making of laws in the USSR?

### *The Nature of the Union*

Similar questions may be asked in regard to the nature of the federation in the USSR. It must be remembered that, like Marx before him, Lenin was a centralist, and prior to the Revolution he opposed federation on principle. He was for a centralized, unitary state. If, nevertheless, from 1903 on he put into the Party platform the slogan of "self-determination to the point of secession" for the nationalities of Old Russia, he did so for psychological reasons, in order to make friends out of those embittered nationalities, hoping all the time that when a proletarian state is proclaimed in Russia these nationalities will not want to secede. When, however, in 1917-1918 the border nationalities began to set up their own states, anyway, Lenin beat a hasty retreat and declared himself for federation. Thus, the meager Russian territory held by the Bolsheviks in 1918 was designated as the Russian Socialist Federated Soviet Republic or RSFSR in the first Soviet constitution. When, in December 1922, it was decided to unite the RSFSR with the Ukraine, Byelorussia and Transcaucasia, the Bolshevik leaders had before them three choices: (1) to name the association a "unitary state," *i.e.*, one where the central authorities decide the division of powers between the central and local agencies, or (2) to proclaim it a "confederation" wherein the local entities decide what powers the central agencies of government shall have, or (3) to make the Union a federation, *i.e.*, an association wherein the distribution of power between the federal union and the separate states is fixed in a written constitution which can be altered only by the joint consent of both. The Soviet leaders—in the 1922-24 constitution and again in the 1936 constitution—emphatically proclaimed the Union a federal state. Following the usual federal formula for uniting separate sovereignties into a union, in which each yields certain powers to a common authority and retains all others in local autonomy, article 14 of the constitution reserves certain enumerated powers to the Federal Union, while all residual powers remain in the constituent republics by article 15. The supremacy of federal law is provided for, and while amendments of the constitution need not be ratified by the Union Republics, the fact that both

chambers of the federal Supreme Soviet must vote such amendments is deemed sufficient to protect the Union Republics, since they are equally represented in the Council of Nationalities of the Supreme Soviet the constitution even contains several features which are normally found only in confederations, not federations: it grants each Union Republic the right to secede (article 17) and, since 1944 it even empowers the Union Republics to enter into diplomatic relations with foreign states and to establish their own military formations. Also, each of the Union Republics has a Deputy Chairman on the federal Presidium of the Supreme Soviet, which is considered the collective President of the U.S.S.R. And Soviet theoreticians endlessly reiterate not only the sovereignty and independence of each of the Union Republics but the "national autonomy" even of lower units in the federation, such as the Autonomous Republics, Autonomous Regions, and national areas. Again, the question is, what is truth and what is sham in these provisions and assertions? How much was the individual or the locality protected by these conceptions of law, sovereignty and federalism in the Stalin era?

### *The Realities of the Soviet Polity*

The answer to the questions raised above is that neither the elections of the Soviets, nor the actual operation of the Soviet structure and judicial system disclose any firm guarantees for the protection of the rights and liberties of the individual and the locality or for significant citizen participation in the making of laws. The 1936 constitution provides for universal, equal, direct and secret suffrage, but this outside shell of democratic form has little substance, since the whole conception of the elections to the Soviets—which are controlled by Party organs at every step—is that they offer the Party a means for spotting potential talent for the vast bureaucracy and for arousing the populace to greater productive effort, while serving at the same time to convey a sense of participation in government. Since only one candidate stands for election in each district, the nomination of candidates—in which the Party plays the controlling influence—determines the outcome in advance, and the elections themselves in which over a 99 per cent vote is rolled out become a ceremonial exercise in unanimity. The citizen has the vote but not the choice, and the elections have come to be accepted as a huge mass holiday.

The pyramid of Soviets thus elected—again guided and controlled at every level by corresponding Party organizations—consists of some 60,000 odd local Soviets at the base, *i.e.*, village (over 50,000), city (1600) and borough (nearly 500) Soviets, with intermediate rungs of district (over 4000) and regional Soviets (9 autonomous Regions and 129 Regions), which are topped by the Soviets of the 17 Autonomous Soviet Socialist

Republics (ASSR), 15 Union Republics, and finally the central Soviet organs of the USSR—the Supreme Soviet, Presidium of the Supreme Soviet and the Council of Ministers. It is these central organs which concern us most in the question of law-making.

Who makes laws in the U.S.S.R.? And to what extent—if any—do they express the sovereign will of the people? To begin with, we should note that Soviet constitution-makers never recognized any need for separation of powers. Steklov, the chairman of the commission which drew up the first Soviet constitution, stated in 1918 that the Soviets will not follow the example of bourgeois constitutions which "inspired by the doctrinarism of the propertied classes . . . make an artificial separation between the executive, the legislative and the judicial powers." The 1918 and 1924 constitutions expressly ascribe both legislative and executive power to the then existing Congress of Soviets, Central Executive Committee (C.E.C.), Presidium C.E.C., and Council of Ministers (then called Council of People's Commissars). While the new constitution equally repudiated the separation of powers principle—asserting instead, in Vyshinsky's words, "the general spirit of the unity of governmental power"—it nevertheless provided for a strict division of functions which made the formal scheme of power outwardly akin to the British parliamentary system, with a doctrine of parliamentary supremacy and responsibility of the executive to the legislature. The Soviet parliament—the Supreme Soviet—elected for a four-year term and comprising at present a membership of 1,378—meets twice a year for about a week at a time. It consists of two chambers with equal powers: the Council of the Union—elected on the basis of one deputy per 300,000 people, and the Council of Nationalities—elected on the principle of nationality on the basis of 25 deputies from a Union Republic, 11 from A.S.S.R., 5 from an Autonomous Republic and one from a national area. The Soviet constitution and constitutional theory emphasize endlessly that as the organ of the sovereign people the Supreme Soviet is "the highest organ of the state power in the U.S.S.R.," the source of all authority, possessed "exclusively" of the legislative power of the Union.

The Supreme Soviet elects for four-year terms the Presidium of the Supreme Soviet or so-called "collective President"—a body of 33 which serves as titular head of the U.S.S.R. and is empowered to issue decrees and interpret laws in force—and also the Council of Ministers (now composed of some 60 members) which is expressly designated by the constitution as the "executive and administrative organ." Both the Presidium of the Supreme Soviet and Council of Ministers are supposed to be responsible and accountable to the Supreme Soviet. The decrees of the Presidium of the Supreme Soviet must be submitted for confirmation by the Supreme Soviet,

while the right of the Council of Ministers to issue decisions and orders—Soviet theoreticians repeat times without number—can be exercised only "on the basis of and in pursuance of the laws" of the Supreme Soviet (arts. 64-66). Thus, the official theory is one of exclusive law-making by the sovereign organ of the people—the Supreme Soviet and subordination to it of both the Presidium of the Supreme Soviet and the Council of Ministers. Practice, however, discloses an entirely different picture. While the theory is that the Supreme Soviet represents the interests of the entire population through the Council of the Union, and of the specific interests of the nationalities through the Council of Nationalities, the Supreme Soviet is in fact an assemblage of the Soviet elite—a gathering of notables—coopted by the Party summit and expressing the aims and interests of the Party. Not only is it *not* the source of all authority, but it is itself an auxiliary instrument of the Party summit, the 255 member Central Committee and especially the 24 member Presidium of the Central Committee of the Party), which benefits politically from the fact that the fiction of popular sovereignty and of the Supreme Soviet as its supreme expression is maintained. The Supreme Soviet is far from being the sole legislative organ even in a purely formal sense, because even by official statistics it is amply clear that important legal norms are passed in vastly greater numbers in the form of decrees of the Presidium of the Supreme Soviet and Council of Ministers decisions and orders. While decrees of the Presidium of the Supreme Soviet require approval by the Supreme Soviet, practice shows that many Presidium decrees on vital subjects (such as the June 1940 decree changing the constitutionally provided (art. 119) seven-hour labor day to an eight-hour labor day, or the October 1940 decrees on labor reserves and compulsory transfer of engineers and foremen) are in effect many months *before* approval by the Supreme Soviet and such approval is purely pro forma and unanimous without discussion or debate. In point of fact, the greatest producer of legal enactments binding throughout the U.S.S.R. is the Council of Ministers. Yet such enactments are not submitted at all for confirmation by the Supreme Soviet. For example, article 121 of the 1936 constitution provided for free education, including higher education. But in 1940 the Council of Ministers ordered tuition fees in colleges and higher grades of secondary schools. The order became, of course, obligatory throughout the land and only seven years later was the constitution amended to embody the change. Still a third category of vital enactments which are nowhere provided for in the constitution or laws, and which completely pass up the Supreme Soviet are the joint resolutions of the Central Committee of the Party and the Council of Ministers, which have been published from time to time since 1931 and bear orders to governmental bodies or public institutions directly affecting the citizens.

In sum, the Supreme Soviet, in theory the highest expression of popular sovereignty, is a rubber stamp body whose existence enables the Communist leaders to claim periodic approval of their decisions by the so-called "sovereign" organ of the people. It is merely one of several official Soviet organs through which the will of the Party leaders—the decisions they adopt—are given formal garb as either a law of the Supreme Soviet or a decree of the Presidium of the Supreme Soviet or an order of the Council of Ministers, with—as is the case quite often—administrative acts changing laws and on occasion even the constitution itself. This practice illuminates clearly both the real nature of the legislative process and the tenor of Soviet constitutionalism.

Similar illustrations are afforded by Soviet practice in the field of federalism. The communist leaders have promulgated numerous arrangements to assure the centralization rather than dispersion of political authority. Even on the purely formal side the powers granted by the constitution to the Union are tremendous. They embrace not only basic principles and direction in the field of foreign policy, but finance, trade, industry, agriculture—in fact every important field. The industrial reorganization of May 1957 has not changed the fact that the entire economy is directed on the basis of one unified plan, that even the budgets of the smallest localities are part and parcel of the Union budget, while taxes, revenues and expenditures are planned or confirmed and controlled from the federal center. The powers reserved for the Union Republics are few, and on the basis of the all-pervading principle of "dual subordination" (which makes each level of administration subject to and subordinate to the level above it) even the exercise of these few powers is supervised, directed and controlled from above by the federal center. The federal Presidium of the Supreme Soviet can declare null and void decisions of the Councils of Ministers of the Union Republics and the federal Council of Ministers can suspend such decisions. The Procurator-General of the USSR has his own agents in every republic responsible to him alone and completely independent of Union Republics governments. And of course the most centralizing aspect is the operation of the centralized, unitary Communist Party. The communist leaders have shown little interest in observing constitutional niceties. To begin with, the right of secession has always been pure fiction. In the purges of 1936-38 almost all the Premiers of the Union Republics were shot precisely because of accusations that they wanted to detach the republics from the U.S.S.R. The 1944 reform for separate diplomatic services and armies was never meant to be seriously implemented and remains a dead letter. The boundaries of the Union Republics have been repeatedly altered without their consent, and during the war the Chechen-Ingush, Kabardino-Balkar, Crimean Tartar and Volga-German Autonomous Republics were dissolved

and their populations deported wholesale. As Khrushchev himself stated in his secret speech in February 1956, the only reason the Ukrainians escaped this fate is that "there were too many of them and there was no place to which to deport them." Not only a Marxist-Leninist he concluded "but also no man of common sense can grasp how it is possible to make whole nations including women, children, old people, Communists and Konsomels responsible for inimical activity, to use mass repression against them, and to expose them to misery and suffering for the hostile acts of individual persons or groups of persons." To cap it all, there came in the postwar years the ugly facet of Stalinist anti-semitism with the wanton extermination of the Jewish cultural intelligentsia, removal of Jews from many fields of activity, and the infamous "Doctors Plot" in 1953 with the threat of wholesale exile of the Jews to Siberia behind it. Thus, the so-called "federal solution" in the U.S.S.R., which was supposed to serve as a beacon for the world in solving the tangled problem of relations between nations, has turned out to be in practice largely a delusion.

### *The System of Justice*

Similar conclusions may be drawn with regard to the question of justice for the Soviet citizen under the Soviet concept of "legality" and its application by the judicial system in the Stalin era. According to the constitution (art. 102) the system of justice in the U.S.S.R. is represented by (1) Peoples Courts—elected by citizens of a district for a three-year period, (2) the intermediate courts of territories, region and areas elected by their Soviets for five-year terms, and (3) the Supreme Courts of Autonomous Republics, Union Republics and the U.S.S.R.—each elected by its respective Supreme Soviet for a term of five years. Along with the judges, "people's assessors" or lay judges are elected in regular judicial elections for ten days annual service. Two such assessors sit with a judge in original trials and are supposed to pass on both questions of fact and law along with him. Outside of this formal structure, yet obviously a part of the system of justice in the broader sense of the word, are the so-called "comradely courts," *Gosarbitrazh, i.e.,* administrative arbitration boards, and until September 1953 the Special Boards of the MVD (Secret Police). The comradely courts are merely informal meetings of citizens in apartment houses, offices, factories, or parks to settle disputes over petty injuries that arise among citizens in such places. The "judges" can exact a small fine from the offender who, however, can take the matter to a "people's court" if he feels aggrieved by the decision. The MVD Special Boards were the exact opposite of the "comradely courts" in the range of "justice" meted out. While in the comradely courts ordinary citizens assume a public role on single occasions of minor offenses and function openly before the eyes of all present, the MVD

Boards consisted of secret police officials, sitting in camera in supposedly actual or potential serious political offenses. And the sentences they passed out ranged from banishing the accused from a particular locality or the country, to forced labor up to five years, or even the death penalty. In case of the latter execution followed within 24 hours and there was no opportunity to appeal the sentence. The sentences of the MVD Boards were not subject to interference by the courts. Only the Procurator General or his representative could be present at sessions of an MVD Tribunal. If he felt that an extreme injustice was being perpetrated he could appeal at once to the highest Party leadership, but of course it would take a man of extraordinary courage and of very high standing with that leadership to range himself against the top hierarchy of the MVD.

In the ordinary courts there are only two stages for any case—the original trial in a "People's Court" or one of an area, or region acting as a court of original jurisdiction and then an appeal to the next higher court. Only the Procurator General or his subordinates at the appropriate level can protest the appellate decision to the Union Republic Supreme Court or in extremely important cases to the U.S.S.R. Supreme Court. As a rule, the nature of the review consists of an examination of the record of the lower court, but an independent examination of the evidence is not excluded if the office of the Procurator General deems it necessary and introduces new evidence. It should also be remembered that the President of the Supreme Court can call up any case from any docket in the U.S.S.R. for examination and review.

The Supreme Court of the U.S.S.R., designated as the "highest judicial organ" in the land, consisted until February 1957 of 79 judges and 35 People's Assessors. It operated through five "collegia" or divisions: criminal, civil, military, water transport and railroad transport, had original jurisdiction in extremely important cases, such as high treason, and was charged with the supervision of the judicial activities of all the courts in the land. Appeals were heard in plenary sessions, which were also taken up with the framing of instructions for the general practice and procedure of the courts. The February 1957 reform eliminated the water and railroad transport collegia, cut down the composition of the court without specifying its membership,[3] and directed that the Supreme Court should substantially reduce its supervisory functions in cases which have been considered by Union Republic courts so that it may be able to concentrate attention on studying and generalizing court practice and working out more carefully guiding interpretations for the courts.

[3] At present the Supreme Court consists of 12 judges—the Chairman or President, two Deputy Chairmen and nine judges—and when a plenary session is held it comprises also the 15 Chief Justices of the Union Republic Supreme Courts. Thus the plenum consists of 27 judges. Twenty People's Assessors are attached to this court.

The Supreme Court of the U.S.S.R. has never possessed any powers of judicial review. It cannot pass on the constitutionality of legislation or the legality of acts of the Government. Even the function of interpreting laws is given by the constitution not to the Supreme Court but to the Presidium of the Supreme Soviet. In fact, up to 1936 the Supreme Court was described officially as being "attached" to the Central Executive Committee of the Soviets. The new constitution omits such designation and declares that all judges in the U.S.S.R. are "independent and subject only to law."

Last, but not least in the judicial system, is the Office of Procurator General (or Attorney General). At first it was "attached" to the Supreme Court of the U.S.S.R. and had no power over the procurators of the republics. Progressively, however, it became more and more centralized and under the new constitution it is one of the most powerful organs of the Soviet structure. The Procurator General is elected for a term of seven years (longer than the Council of Ministers and the Supreme Court) and he himself directly appoints the procurators of the republics and regions and confirms those of lower rungs—all of whom are deemed his agents. Soviet constitutional theory emphasizes his independence not only of the Supreme Court but of the executive power and hierarchical influences. The extraordinary prerogatives granted him by the constitution are embodied in article 113 which reads: "Supreme supervisory power to ensure the strict observance of the law by all Ministries and institutions subordinated to them, as well as by officials and citizens of the U.S.S.R. generally, is vested in the Procurator General of the U.S.S.R." In short, he is the watchdog of legality in the Soviet polity.

Again the question may be posed: did this position of the Procurator General and the system of justice as a whole safeguard the Soviet citizen in his constitutional rights. The answer, punctuated for the whole world by Krushchev's revelations concerning the monstrous crimes of the Stalin era, is obvious enough. Where was Andrei Vyshinsky, the Procurator General of the U.S.S.R., at the time the "guardian of legality," why didn't he stop these crimes, not only against ordinary people, but against Central Committee members and even such Politbureau candidates as as Rudzutak, Eikhe, Postyshev and others? The answer is simple enough. In the prevailing conception of the judicial process, neither the judiciary nor the Procurator General are outside of politics. Both, in Vyshinsky's own words, are "carriers of the policy of the Communist Party" and the contents and form of their activities "cannot avoid being subordinated to political class aims and striving." It was Stalin who controlled the Party and determined its "aims and strivings," and Vyshinsky could not be anything but an obedient tool. In such a concept on of the judiciary, the grandiose Bill of Rights of the Soviet Constitution could not but remain a hollow mockery.

### *The Liberalizations of the Post-Stalin Period*

Thus we come to our final question: did the post-Stalin liberalizations substantially change the outlook—can we now look forward to genuine constitutionalism and the Rule of Law on the Soviet scene? On the whole, it appears the answer must still remain in the negative.

To be sure, along with the economic-administrative reorganization of 1957, the inclusion of the Chief Justices of the Union Republics in the Plenum of the Supreme Court U.S.S.R. and of the Premiers of the Union Republics as ex officio members of the U.S.S.R. Council of Ministers, are gestures in the direction of the rights of the nationalities. And, what is far more important, the liberalizations in the fields of law and justice constitute positive steps forward.

These liberalizations can be summarized as follows:

1. Since March 1953 a number of amnesties freed prisoners with sentences of five years or less, pregnant women, juvenile delinquents, overaged and sick persons, and even some political prisoners.

2. In a series of trials against Stalin's terror apparatus the key leaders of the Secret Police were shot, many others were replaced, the special MVD Boards were abolished, and the Secret Police (now KGB) was definitely subordinated to the Party and the Council of Ministers.

3. The regime of the forced labor camps was reformed. Prisoners were allowed reduced terms for overfulfilling production norms, uniforms were abolished, food was improved and visits by relatives were permitted. Many camps were entirely abolished, while most of the others have been converted into so-called "reeducation by labor colonies," *i.e.*, the prisoners are permitted to live with their families outside the camp grounds and are paid for work as free laborers while remaining within the region.

4. Perhaps the brightest spot in this picture is the minimum security prisons—such as Krukovd outside Moscow which so impressed Judge Leibowitz.[4] These are prisons without stone-wall fences, with wholesome food, ordinary dress, time for study and recreation, opportunities to learn a trade, pay equal to that of outside workers, permission for wives to visit with their husbands several days each month in the prison's special quarters for married couples, and lastly, in many cases, the complete expunging of a man's criminal record upon release from prison.

5. Finally, on December 25, 1958, the Supreme Soviet of the U.S.S.R. adopted Basic Principles of new codes on Criminal Law and Criminal Procedure which will serve as a basis for new codes to be prepared by the Union Republics. The new codes return to the traditional terminology of "crime" and "punishment," define more precisely so-called "counterrevo-

[4] See the article by Judge Leibowitz in Life, June 8, 1959.

lutionary crimes," raise the age of responsibility for serious crimes from 12 to 14, reduce the maximum prison sentences for most crimes from 25 years to 10-15 years, and above all abolish the "rule of analogy," which—contrary to the universally respected principle *Nullum Crimen Nulla Poena Sine Lege* (an act is not a crime unless it is so specified by statute which provides the penalty for it)—punished a man for an offense not covered by law but merely resembling one defined by statute. Also, the death penalty is no longer mandatory, but depends upon the decision of the court.

There is no doubt that these innovations spell a more humane approach. But do they really signify complete justice for the citizen, and above all do they portend a guarantee of stability for the constitutional rights of the citizenry?

To begin with the New Code preserves a number of the old negative features:

1. On the vital question of a presumption of innocence, it is so vague that it straddles the fence.

2. The Pre-trial Investigation, which is conducted by investigators of the public prosecutor or the secret police, or both, is retained. Under this system, a citizen can be seized and held incommunicado without trial for as long as nine months without any court warrant and without any right of the court to intervene. While evidence is gathered against him and the case prepared, the citizen can do nothing but wait.

3. While the New Code now allows defense counsel to see him in custody, the lawyer is entirely excluded from the pre-trial proceedings. Only when the case is fully built and presented can he appear in court, and even then he has no right to question the state's witnesses on his own. The assumption is that the investigators were "objective" in the preliminary investigation. Generally, the position of "defense counsel" is rather anomalous in Soviet courts and he often vies with the prosecutor in accusing the defendant.

4. There is a basic inequality in the right of appeal between citizen and prosecutor. The citizen can appeal only once—to the next higher court, which will check whether the judgment is legal and well-based—and he cannot appeal to the Federal Supreme Court. But the Procurator General and his agents and the presidents of the higher courts can reopen any closed case. A prosecutor can appeal a conviction if he thinks it is not harsh enough, or even an acquittal until a year has elapsed. In all other cases there is no time limitation.

5. One of the worst scourges of the Soviet system of justice was the lack of publicity for most statutes, decrees, Council of Ministers decisions and court proceedings. Even some of the recent liberalizing laws came to light only slowly and indirectly because the Party leaders apparently preferred

to hold certain measures ready for instant reversal. And this situation has not been entirely remedied. Also, the powers of the MVD and KGB are still not precisely defined.

6. Lastly, there is such a travesty on justice as the Law on Social Parasites in existence in seven of the republics, under which persons "who carry on a parasitic mode of life . . . as well as those living on unearned income" may be exiled to from two to five years of forced labor by a committee of one's neighbors, a decision which becomes final on approval of the local Soviets. No judicial body takes part in such banishment. Indicative of the distance between Soviet and Western democratic conceptions of justice is the fact that while Justice Leibowitz calls this "drumhead justice, many times more dangerous and primitive than the evils it is designed to punish," Soviet Procurator General Rudenko considers it "a matter of communal welfare . . . not a criminal matter," and Supreme Court Justice Smirnov defended it in similar terms.[5]

## *Conclusions*

Thus, the basic criterion of the efficacy of law and rights in the U.S.S.R. is still the fundamental Soviet view of justice and its relation to the political process. Many articles of the New Codes contain definitions of individual crimes which are either very broad (for example, the flight or refusal to return from abroad is defined as treason, punishable by a sentence of 15 years or the death penalty), or are phrased in a loose manner and non-legal language. There is no guarantee against a too broad interpretation of the articles of the codes under changes in the political climate. Should such changes take place, there is nothing in the political philosophy of the present leaders to hold them back from the full application of violence and the denial of individual rights. Taking issue with Bukharin's statement (1923) that "Revolutionary legality means an end to any arbitrary administration, including the revolutionary," Vyshinsky declared: "In a proletarian state, every measure—regardless of whether it is 'legal' or 'extraordinary'—has as its source the dictatorship of the proletariat." The proletarian dictatorship is itself "the highest law," defining the concrete content of all and every law. It is what Lenin called it: "A power not limited by any laws, not restrained by any absolute rules, resting directly on force."[6] The dictatorship employs both laws and extraordinary administrative measures. Law is *one* of its means of struggle, a method of the dictatorship. Consequently, judges and jurists must always look at a law from the standpoint of whether or not it answers the needs of the revolution, rather than stress the wording or legal

[5] *Ibid.*

[6] VYSHINSKY, REVOLIUTSIONNAIA ZAKONNOST' NA SOVREMENNON ETAPE 51, 52, 55 (Moscow 1933).

formula of the law. "The formal law is subordinate to the law of the Revolution," Vyshinsky concluded. "There might be collisions and discrepancies between the formal commands of laws and those of the proletarian revolution. . . . The collision must be solved only by subordination of the formal commands of law to those of Party policy."[7]

Despite some recent criticism of Vyshinsky this is still the dominant view of Soviet jurisprudence. While limited justice—applying to ordinary matters which involve neither basic policy, nor the security or prestige of the leaders, nor current expediential needs—exists in the U.S.S.R., the Rule of Law is still a long ways off. Although it is termed the "supreme law of the land," the constitution is not an absolute or firm charter of rights and liberties, and constitutionalism is still a fiction in the U.S.S.R. In the Soviet state, Party fiat is the law above the law. Unlike constitutions elsewhere, the Soviet constitution does not hold the Government to the constitutionally enumerated powers. And the Party itself, which controls the Government, is not subject to any laws—the constitution does not bind or restrict the highest Party leadership. This leadership assumes that it must have unlimited political power during the period of transition to communism, and that it alone must remain the ultimate judge of the limits and priorities of all rights and liberties in the U.S.S.R. This makes of the Soviet regime a "Government of Men" and not a "Government of Laws." Under such a government law, rights, and liberties can be no more than conditional quantities wholly dependent upon political expediency and the reading of the barometers of the internal and external balances of power by the Communist leaders.

[7] VYSHINSKY, SUDOUSTROISTVO v SSSR 24 (Moscow 1936).